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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA

Equal Employment Opportunity Commission,  
  
Plaintiff,  
  
vs.  
  
Maricopa County,  
  
Defendant.

No. 02-CV-1874-PHX-PGR

ORDER

This matter comes before the Court on Defendant's Motion for Attorneys' Fees and Related Non-Taxable Expenses (Doc. 119). The Plaintiff filed this action on September 25, 2002, alleging that the Defendant violated her rights under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621, *et. seq.* The Defendant moved for summary judgment on the grounds that the Plaintiff failed to establish a *prima facie* case of discrimination as well as her failure to rebut the Defendant's non-discriminatory reasons for its decision not to rehire her. The Court granted the Defendant's Motion for Summary Judgment and judgment was entered on January 7, 2005, dismissing this action. The Plaintiff appealed the Court's decision on March 4, 2005, and the Ninth Circuit Court of Appeals affirmed this Court's Order granting summary judgment in Defendant Maricopa County's favor on February 20, 2007.

1 Since the Ninth Circuit has affirmed this Court's grant of summary judgment in  
2 Defendant's favor, the Defendant now seeks to recover its attorneys' fees and related non-  
3 taxable expenses in the amount of \$88,769.00 and \$28,287.94 respectively. The Defendant  
4 Maricopa County argues that it is entitled to fees under 28 U.S.C. § 1927, and the Court's  
5 inherent powers, because the EEOC pursued this case in bad faith and needlessly and  
6 vexatiously multiplied the litigation.

7 As a preliminary matter the Court notes that the Defendant's original motion also  
8 sought an award of fees pursuant to the Equal Access for Justice Act ("EAJA"), 28 U.S.C.  
9 § 2412(b). Since the EEOC, an agency of the United States government, brought this action,  
10 the EAJA requires it to pay fees unless the EEOC can establish it pursued this case with  
11 "substantial justification." The relevant portion of the statute reads as follows:

12 Except as otherwise specifically provided by statute, a court  
13 shall award to a prevailing party other than the United States  
14 fees and other expenses . . . incurred by that party in any civil  
15 action . . . brought by or against the United States . . . unless the  
16 court finds that the position of the United States was  
substantially justified or that special circumstances make the  
award unjust.

17 28 U.S.C. 2412(d)(1)(A). The Defendant, in its reply brief, withdrew its fee request under  
18 the EAJA because, since the date the opening brief was filed, it realized that it did not meet  
19 the financial eligibility requirements for such an award. 28 U.S.C. § 2412(d)(2)(B). As  
20 noted by the Defendant, this was not an issue the Plaintiff EEOC raised in its opposition  
21 brief. Although the "substantial justification" standard is no longer the applicable standard  
22 before the Court, it is clear that the Defendant would have prevailed under the EAJA.  
23 However, the record in this case supports more than merely a finding that the EEOC pursued  
24 this case without substantial justification. It is apparent that the EEOC's conduct is  
25 indicative of bad faith.

1 Although the ADEA does not provide attorneys' fees to a prevailing defendant, the  
2 court, however, may award attorneys' fees to a prevailing defendant under the bad faith  
3 exception to the American Rule. Specifically, a trial court may award attorney's fees to the  
4 prevailing party when it finds the losing party has acted in bad faith, vexatiously, wantonly  
5 or for oppressive reasons. *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 340,  
6 358-59 (1975). A plaintiff who litigated in bad faith may be sanctioned since both § 1927  
7 and the court's inherent powers were designed to sanction specific abuses which the ADEA  
8 does not address. However, bad faith is essential to a fee award under both § 1927 and the  
9 court's inherent powers. *Fink v. Gomez*, 239 F.3d 989, 992 (9<sup>th</sup> Cir. 2001) (finding of bad  
10 faith required for an award under court's inherent powers); *In re Keegan Mgmt. Co.*  
11 *Securities Litigation*, 78 F.3d 431, 436 (9<sup>th</sup> Cir. 1995) (bad faith finding required for award  
12 under 28 U.S.C. § 1927). Furthermore, sanctions may be awarded under § 1927 for recklessly  
13 pursuing a frivolous claim, or for pursuing a meritorious claim for the purpose of harassment.  
14 *In re Keegan Mgmt.*, 78 F.3d at 436. Section 1927 findings must be supported by a finding  
15 of subjective bad faith; however, knowing and reckless conduct meets this standard. *Id.*

16 First, the Defendant maintains that this is not the case where the Plaintiff innocently  
17 pursued frivolous claims – instead, the Plaintiff knowingly or recklessly pursued completely  
18 baseless litigation. To support this assertion, the Defendant argues that the Plaintiff knew  
19 from the outset that it had no admissible ageist statement and conducted a one-sided sham  
20 investigation, designed to reach a finding against the County. For example, the Defendant  
21 contends that the Plaintiff stated at the Case Management Conference that it had a star  
22 witness who would supposedly establish the existence of an ageist statement. However, this  
23 star witness later turned out to be Anderson who had refused to provide an affidavit and who  
24 swore under oath that she could not say such a statement had been made.

25 The Court finds the Defendant's arguments sufficient to establish a finding of  
26 subjective bad faith. First and foremost, both this Court and the Court of Appeals found that  
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1 the EEOC could not prove that Mabery made any statement containing the word “old.” No  
2 one ever acknowledged hearing any alleged age-related comments, despite the EEOC  
3 continued insistence that it could prove such a statement was made. The EEOC’s contention  
4 that the terms “tired” or “burned out” were sufficient to justify its pursuit of the age  
5 discrimination claim against the County is against the legal standard in this circuit. It has  
6 been well established that statements which have no clearly discriminatory meaning have no  
7 evidentiary value. *See Coleman v. Quaker Oats Co.*, 232 F.3d 1271 (9<sup>th</sup> Cir. ). It is clear to  
8 the Court that the EEOC had no evidence of discrimination when it filed the case against  
9 Defendant Maricopa County.

10       The Plaintiff further argues in its opposition that the fact that non-decision makers had  
11 different perceptions of Toth’s interview performance than Mabery justified its pursuit of this  
12 action. Again, the Court finds this argument frivolous. As noted by the Defendant, although  
13 non-decision makers had different opinions about Toth’s interview performance and her  
14 qualifications for the job, there was no dispute over the objective facts upon which Mabery  
15 based her opinion and resulting decision. The Defendant provided evidence that the decision  
16 not to hire Toth was based in part on: (1) changed job requirements Toth did not meet; (2)  
17 Toth’s prior dissatisfaction with pay and benefits which made it likely that she would be  
18 unhappy in the lower level, lower paying position she was seeking; and (3) Toth’s admitted  
19 dissatisfaction with MCAO. Furthermore, it was undisputed that Toth had been a frequent  
20 complainer when she worked for MCAO, and the other interviewers were in agreement with  
21 this fact. The Plaintiff did not attempt to counter any of this evidence, and even admitted that  
22 these reasons could provide a legitimate basis for not hiring Toth. Instead, the Plaintiff  
23 seemed to ignore, or disregard, the standard governing pretext analysis. It is a well-  
24 established principle that pretext cannot be established through evidence that a decision-  
25 maker made the wrong decision – doubt is only cast on the decision-maker’s motives if there  
26 is proof that she lied about the reasons for her decision. *See, e.g., Schuler v. Chronicle*  
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1 *Broadcasting Co.*, 793 F.2d 1010, 1011 (9<sup>th</sup> Cir. 1986); *Wolf v. Buss (America) Inc.*, 77  
2 F.3d 914, 919 (7<sup>th</sup> Cir. 1996), *cert. denied* 519 U.S. 866 (1996).

3 The EEOC also argues that Toth's prior positive performance evaluations supported  
4 a finding that Mabery's opinion was pretextual. However, the Plaintiff obviously ignores  
5 established precedent when advancing this position and offers no citation to support its  
6 argument. Performance evaluations are not proof of pretext unless they leave absolutely no  
7 room for disagreement. *Wileman v. Frank*, 979 F.3d 30, 35 (4<sup>th</sup> Cir. 1992). This is certainly  
8 not the case regarding Toth. Furthermore, the Ninth Circuit Court of Appeals noted that  
9 there was no evidence that Mabery ever reviewed Toth's evaluations and that the  
10 uncontroverted evidence showed that Mabery did not prepare them. The EEOC should have  
11 been aware that the performance evaluations are proof of nothing

12 The Plaintiff also falsely contends that it provided evidence that Toth was more  
13 qualified than those offered the position. Such an argument is indeed recklessly advanced.  
14 In fact, the Ninth Circuit noted in its opinion affirming this Court's grant of summary  
15 judgment in the Defendant's favor that the EEOC completely failed to rebut evidence that  
16 Toth was less qualified than the Spanish speakers who also had degrees in the relevant field.  
17 This Court similarly noted the EEOC's lack of evidence in this regard.

18 The Court is also persuaded by Defendant's argument that the EEOC had no basis  
19 upon which to obtain any remedy as the EEOC knew that there were no compensable  
20 damages. The Defendant notes that it raised this issue in its motion for summary judgment  
21 and produced both lay and expert testimony in support thereof. It is undisputed that Toth had  
22 a higher paying job with the County in Superior Court than she would have had Mabery  
23 made the decision to hire her for the MACO position. In fact, the victim witness job which  
24 she interviewed for would have been a demotion for Toth. Although the Plaintiff argues that  
25 it could obtain injunctive relief, the case law suggests otherwise. Indeed the case the Plaintiff  
26 cites in support of its position that injunctive relief was an available remedy does nothing to  
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1 advance its position. In *EEOC v. General Lines, Inc.*, the court noted that there were  
2 allegations regarding a class action suit challenging *patterns* of discriminatory practices in  
3 employment. 865 F.2d 1555, 1565 (10<sup>th</sup> Cir. 1989). A party seeking injunctive relief needs  
4 to establish “some cognizable danger of recurrent violations.” *Id.* Clearly, the EEOC had  
5 no evidence of discriminatory practices and could not make a showing that a danger of  
6 recurrent violations existed. It appears to the Court that the EEOC cited inapplicable law in  
7 support of a frivolous position.

8         The Court concludes that the EEOC pressed forward with an age discrimination claim  
9 which was clearly without any foundation. Sanctions, in the form of attorney’s fees, may be  
10 awarded where a frivolous claim is recklessly pursued. *In re Keegan Mgmt.*, 78 F.3d at 436.  
11 Certainly, refusing to drop a claim known to be baseless, thereby forcing the other party to  
12 file a costly motion for summary judgment is sufficient misconduct to support a fee award  
13 under both the Court’s inherent powers and Section 1927. *Heary Bros. Lightning Protection*  
14 *Co. v. Lightning Protection Institute*, 287 F. Supp. 2d 1038, 1081 (D. Ariz. 2003). Perhaps  
15 the most glaring example of bad faith in this case is the EEOC’s continued persistence that  
16 there is direct evidence of age discrimination. The Plaintiff does so even though both this  
17 Court and the Court of Appeals concluded otherwise.

18         Furthermore, the Court finds the Plaintiff’s objections to the reasonableness of the fees  
19 equally unpersuasive. First, the Defendant has submitted unrefuted proof that the rates  
20 charges were below prevailing market rates. Although the Plaintiff argues that defense  
21 counsel’s affidavit regarding her knowledge of the prevailing rates in the community is  
22 insufficient to establish the rate is reasonable, Ninth Circuit law requires otherwise. It is well  
23 established that an attorney may opine about the reasonableness of her rates based on her  
24 knowledge of what others charge in the community or at what rate she has received awards  
25 in the past. *Welch v. Metropolitan Life Ins. Co.*, 2007 WL 656390 (9<sup>th</sup> Cir, March 6, 2007);  
26 *Phelps Dodge*, 896 F.2d at 407. Defense counsel charged \$110 per hour for partners’ time  
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1 and 100 per hour for time billed by associates. In *Phelps Dodge*, the Ninth Circuit held that  
2 the District Court abused its discretion in reducing legal fees to \$100 per hour because 130-  
3 150 per hour was a reasonable market rate for civil rights cases, and this was ruling was  
4 made in 1989. *Id.* As the Defendants note, the rate charged is not even average – it is well  
5 below average.

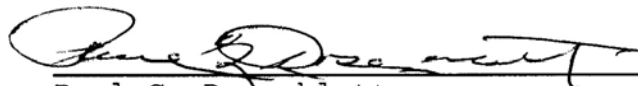
6 In addition, the Court finds the Plaintiff's other objections regarding the amount of  
7 attorneys' fees requested without merit. A court may not reduce the number of hours for  
8 which fees may be awarded without adequate documentation of the reasons for doing so.  
9 *United States Steel Workers of America v. Phelps Dodge Corp.*, 896 F.2d 403, 407 (9<sup>th</sup> Cir.  
10 1990). The Plaintiff vaguely contends that some entries are labeled legal with they are more  
11 aptly characterized as clerical. However, as noted by the Defendant, the Plaintiff raises these  
12 objections without identifying any particular time entries or setting forth an amount of fees  
13 allegedly at issue. The Plaintiff is required to do more than make such a generalized  
14 objection. *See, e.g., Woolridge v. Marlene Indus. Corp.*, 898 F.2d 1169, 1176 n. 14 (6<sup>th</sup> Cir.  
15 1990)(defendant should raise objections with specificity pointing out particular items).

16 However, the EEOC's objection regarding pre-litigation tasks is in accordance with  
17 applicable law. Although the Defendant argues that even work done for administrative  
18 proceedings required as a prerequisite to suit may be recoverable as long as it was necessary  
19 to the ultimate attainment of relief. *See New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54  
20 (1980)(holding Title VII permits recovery of fees related to administrative proceedings  
21 related to state human rights agency as they were prerequisite to suit); *see also Native Village*  
22 *of Quinhagak v. United States*, 307 F.3d 1075, 1081 (9<sup>th</sup> Cir. 2002)(holding district court  
23 could award fees for prelitigation administrative activities under the Alaska National Interests  
24 Land Conservation Act). However, the attorney's fees in the cases cited were not awarded  
25 pursuant to Section 1927.

26 Based on the forgoing,  
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1 IT IS ORDERED that the Defendant's Motion for Attorneys' Fees and Related Non-  
2 Taxable Expenses (Doc. 119) is GRANTED. The Defendant is awarded attorneys fees and  
3 non-taxable expenses in the amount of \$88,769.00 and \$28,287.94 respectively. The  
4 Defendant is further awarded its costs associated with filing the motion for attorneys' fees  
5 and the costs associated with updating the motion – \$9,258.00.

6 DATED this 11<sup>th</sup> day of December, 2007.  
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11 Paul G. Rosenblatt  
12 United States District Judge  
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